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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 EDWARD T. LARISH,

8 Plaintiff,

9 v.

10 UNITED STATES OF AMERICA,
11 et. al.,

12 Defendant.

NO. CV-09-5015-RMP

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13
14 **I. Introduction**

15 Before the Court are the motions by the United States of America ("United
16 States") for an order dismissing Edward Larish's claims in this matter and an order
17 granting summary judgment for the United States (Ct. Rec. 9).

18 The Court has reviewed and considered Mr. Larish's complaint and
19 accompanying exhibits (Ct. Rec. 1), the United States's Motion to Dismiss and
20 Motion for Summary Judgment (Ct. Rec. 9) and accompanying brief (Ct. Rec. 10),
21 statement of material facts and exhibits (Ct. Rec. 11), Mr. Larish's responsive
22 letters (Ct. Recs. 14, 15, 16, 17, 18, 21, and 24), the United States's reply
23 memorandum (Ct. Rec. 19), the Court's previous notice to Mr. Larish of the
24 dismissal and/or summary judgment rule requirements (Ct. Rec. 13), and the
25 remaining file in this case.

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1 An oral argument hearing was held on April 15, 2010. Mr. Larish
2 represented himself pro se. Rolf Tangvald appeared on behalf of the United
3 States.

4 II. Background

5 The parties largely do not dispute the facts. Where minor disputes exist, the
6 Court views the evidence in the light most favorable to Mr. Larish, the nonmoving
7 party.

8 Mr. Larish happened upon a farm sale in Milton-Freewater, Oregon, in
9 approximately July or August 2007 (Ct. Rec. 1 at 1). There, he purchased one or
10 more ammunition boxes along with their contents. Later he discovered, in one of
11 the boxes, a Maxim, Model 1923, silencer (Ct. Rec. 1 at 2). The silencer had no
12 serial number and was unregistered (Ct. Rec. 11-5, Ex. 3 at 12). After
13 conversations with different people about what Mr. Larish should do to legally
14 possess the silencer, Mr. Larish sent the silencer and a letter to John Spencer,
15 Chief of the Firearms Technology Branch of the Bureau of Alcohol, Tobacco,
16 Firearms, and Explosives ("ATF") (Ct. Rec. 1 at 2). Mr. Larish sent the silencer to
17 Mr. Spencer in an effort to pay the tax and register the device in accordance with
18 the National Firearms Act of 1932 to possess the silencer lawfully (Ct. Rec. 1 at 2,
19 4-6). Mr. Spencer sent Mr. Larish a letter dated May 6, 2008, explaining that the
20 ATF would not return the silencer to Mr. Larish. (Ct. Rec. 1 at 6-8).

21 Mr. Larish sued the United States in United States District Court, Eastern
22 District of Washington, on February 27, 2009, seeking return of the silencer, a
23 declaration that gun control measures, specifically the National Firearms Act and
24 the Gun Control Act, are unconstitutional, and a finding that Mr. Larish was
25 deprived of his constitutional rights when the United States retained his silencer.
26 (Ct. Rec. 1). The United States answered that Mr. Larish had not yet exhausted his

1 administrative remedies and that the Court lacked subject matter jurisdiction while
2 administrative forfeiture proceedings remained an option (Ct. Rec. 4 at 3).

3 ATF notified Mr. Larish of commencement of administrative forfeiture
4 proceedings by a letter dated May 15, 2009 (Ct. Rec. 11, Ex. 1 at 8). The letter
5 informed Mr. Larish of his opportunities to contest the forfeiture in United States
6 District Court, or, alternatively, in ATF's administrative forfeiture process (Ct.
7 Rec. 11, Ex. 1 at 9). Mr. Larish attempted to halt administrative forfeiture
8 proceedings and contest the forfeiture in district court by sending a claim form that
9 the United States asserts, and Mr. Larish does not contest, was not properly
10 endorsed and not certified by a cost bond (Ct. Rec. 11, Ex. 2 at 10). The United
11 States allegedly sent Mr. Larish a letter dated June 4, 2009, informing him of the
12 defects in his claim and extending the deadline for him to submit a proper claim by
13 June 19, 2009 (Ct. Rec. 11, Ex. 2 at 10). Mr. Larish then submitted a signed and
14 dated form, but no bond. (Ct. Rec. 11, Ex. 2 at 10); Defendant's Exhibit 4. The
15 form was accompanied by a letter from Mr. Larish explaining that he would not be
16 sending a cost bond. Defendant's Exhibit 4.

17 The agency alleges it received Mr. Larish's claim form on June 23, 2009
18 (Ct. Rec. 11, Ex. 2). In a letter dated August 5, 2009, ATF notified Mr. Larish that
19 in light of Mr. Larish's flawed application, the agency would proceed with the
20 administrative forfeiture action (Ct. Rec. 11, Ex. 2 at 10). On August 17, 2009,
21 the agency sent Mr. Larish a Declaration of Administrative Forfeiture completing
22 the forfeiture of the silencer to the United States Government (Ct. Rec. 11, Ex. 3 at
23 12).

24 On December 1, 2009, the United States moved this Court to dismiss Mr.
25 Larish's claims and enter summary judgment in favor of the United States (Ct.
26 Rec. 9).

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III. Standards for Dismissal and Summary Judgment

A. Rule 12(b)(1) Standard

This Court, as a federal court, is a court of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377, 114 S.Ct. 1673 (1994). The Court's authority extends only to subject matter authorized by the Constitution or by statute. *Id.* The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See id.* The Court will grant a motion under Rule 12(b)(1) of the Federal Rules of Civil Procedure if the complaint fails to allege grounds for federal subject matter jurisdiction, as required by rule 8(a) of the Federal Rules of Civil Procedure. *See Warren v. Fox Family Worldwide*, 328 F.3d 1136, 1139 (9th Cir.2003).

A motion to dismiss under Rule 12(b)(1) can be facial or factual. *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir.2003). A facial challenge "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. A factual attack, by comparison, "disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039. The moving party may convert "the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court[.]" If that happens, "the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Safe Air*, 373 F.3d at 1039 (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, n. 2 (9th Cir. 2003), *cert. denied*, 541 U.S. 1009, 124 S.Ct. 2067, 158 L.Ed.2d 618 (2004)).

Additionally, where a factual challenge is asserted, in contrast to a facial challenge, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from

1 evaluating for itself the merits of jurisdictional claims.” *Roberts*, 812 F.2d at 1177
2 (quoting *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983)) (internal
3 quotations omitted).

4 *B. Rule 12(b)(6) Standard*

5 The United States also moves under Fed. R. Civ. P. 12(b)(6) to dismiss Mr.
6 Larish’s complaint for failing to state a claim under which relief can be granted.
7 To survive a 12(b)(6) motion, a complaint must contain sufficient facts, “accepted
8 as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
9 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.
10 544, 556, 127 S.Ct. 1955 (2007)). Apart from factual insufficiency, a complaint is
11 also subject to dismissal under Rule 12(b)(6) where it lacks a cognizable legal
12 theory, *Balistreri*, 901 F.2d at 699, or where the allegations on their face “show
13 that relief is barred” for some legal reason, *Jones v. Bock*, 549 U.S. 199, 215, 127
14 S.Ct. 910, 166 L.Ed.2d 798 (2007).

15 *C. Treatment of a Motion to Dismiss under Rule 12 as a Motion for Summary*
16 *Judgment under Rule 56*

17 When a district court looks beyond the pleadings in evaluating a Fed. R.
18 Civ. P. 12(b)(6) motion to dismiss, the court must treat the motion as one for
19 summary judgment under Fed. R. Civ. P. 56. *Grove v. Mead School Dist. No. 354*,
20 753 F.2d 1528, 1532 (1985). However, “[b]efore summary judgment may be
21 entered, all parties must be given notice and an opportunity to respond.” *Grove*,
22 753 F.2d at 1532.

23 The Ninth Circuit has also acknowledged that a district court may properly
24 apply the more stringent summary judgment standard to a motion to dismiss for
25 lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) when the
26 jurisdictional issue and the substantive issues are interdependent and inseparable.

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1 *See Thornhill Pub., Inc. v. General Tel. & Electronics Corp.*, 594 F.2d 730, 733-
2 35 (1979).

3 The United States submitted a declaration and exhibits in support of its
4 motion to dismiss (Ct. Rec. 11) and this court notified Mr. Larish that it would
5 look beyond the pleadings in evaluating the United States's motions to dismiss
6 under Fed. R. Civ. P. 12(b)(1) and (6) (Ct. Rec. 13).

7 *D. Summary Judgment Standard*

8 This Court should grant summary judgment if the parties' pleadings,
9 affidavits, and other admissions on file show that there is no genuine issue as to
10 any material fact and that the moving party is entitled to judgment as a matter of
11 law." Fed. R. Civ. P. 56(c). Summary judgment is the primary tool by which
12 factually insufficient claims can be isolated and prevented from going to trial.
13 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24, 106 S.Ct. 2548, 91 L.Ed.2d 265
14 (1986). In that way it also prevents the unwarranted consumption of public and
15 private resources. *Celotex*, 477 U.S. at 327.

16 The United States, as the moving party, bears the initial burden of
17 demonstrating the absence of a genuine issue of material fact. See *Celotex*, 477
18 U.S. at 323. The moving party must demonstrate to the court that there is an
19 absence of evidence to support the non-moving party's case. See *Celotex Corp.*,
20 477 U.S. at 325. The burden then shifts to the non-moving party to "set out
21 'specific facts showing a genuine issue for trial.'" *Celotex Corp.*, 477 U.S. at 324
22 (quoting Fed. R. Civ. P. 56(e)).

23 A genuine issue of material fact exists if sufficient evidence supports the
24 claimed factual dispute, requiring "a jury or judge to resolve the parties' differing
25 versions of the truth at trial." *T.W. Elec. Service, Inc. V. Pacific Elec. Contractors*
26 *Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). At summary judgment, the court draws

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1 all reasonable inferences in favor of the nonmoving party. If the nonmoving party
2 produces evidence that contradicts evidence produced by the moving party, the
3 court must assume the truth of the nonmoving party's evidence with respect to that
4 fact. *T.W. Elec. Service, Inc.*, 809 F.2d at 631. The evidence presented by both the
5 moving and non-moving parties must be admissible. Fed. R. Civ. P. 56(e).
6 Furthermore, the court will not presume missing facts, and non-specific facts in
7 affidavits are not sufficient to support or undermine a claim. *Lujan v. Nat'l*
8 *Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

10 IV. Discussion

11 A. *Mr. Larish's Claim for Return of the Silencer*

12 Mr. Larish makes a claim in his complaint for the return of the Maxim
13 silencer (Ct. Rec. 1 at 2). The United States argues that this Court should enter
14 summary judgment dismissing Mr. Larish's claim for the silencer based on lack of
15 subject matter jurisdiction to hear the claim. The United States maintains that the
16 occurrence of the administrative process divests this Court of subject matter
17 jurisdiction over Mr. Larish's claim contesting forfeiture. *See Linarez v. United*
18 *States Department of Justice*, 2 F.3d 208 (7th Cir.1993); *see also Simons v. United*
19 *States*, 497 F.2d 1046 (9th Cir. 1974).

20 The Maxim silencer at issue here is a firearm under the National Firearms
21 Act, Title 26, United States Code 26 U.S.C. § 5845(a) (providing that the term
22 "firearm" includes "any silencer (as defined in section 921 of title 18, United
23 States Code)"); 18 U.S.C. § 921(3)(C) ("firearm" means . . . any firearm muffler
24 or firearm silencer"); 18 U.S.C. § 921(24) ("firearm silencer" mean[s] any device
25 for silencing, muffling, or diminishing the report of a portable firearm . . .").

26 The Maxim silencer is unregistered and has no serial number (Ct. Rec. 11-5,

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1 Ex. 3 at 12). It is a violation of Title 26, Chapter 53, United States Code, for any
2 person to receive or possess a firearm “which is not registered to him in the
3 National Firearms Registration and Transfer Record” or “which is not identified
4 by serial number as required by this chapter[.]” 26 U.S.C. § 5861(d), (I). Any
5 “firearm” involved in a violation of any provision of Title 26, Chapter 53, United
6 States Code (Machine Guns, Destructive Devices, and Certain Other Firearms), is
7 subject to seizure and forfeiture. 26 U.S.C. § 5872(a). Forfeiture proceedings for
8 firearms are governed by the same internal revenue laws relating to forfeitures of
9 “unstamped articles”. 26 U.S.C. A. § 5872(a).

10 Once an administrative forfeiture proceeding is commenced by sending a
11 notice of forfeiture proceedings, a person whose property is the subject of the
12 forfeiture may proceed in any of three ways. First, one may pursue a judicial
13 remedy by contesting the seizure and forfeiture in United States District Court. 19
14 U.S.C. § 1608; 21 C.F.R. § 1316.78. A person may halt the administrative
15 forfeiture process and trigger the judicial hearing by filing, within 20 days from
16 the date at the top of the notice letter, a claim of ownership accompanied by a cost
17 bond with the ATF. 19 U.S.C. §1608. The cost bond should be in the amount of
18 either “\$5000 or 10 percent of the value of the claimed property, whichever is
19 lower, but not less than \$250 dollars.” 19 U.S.C. § 1608. Therefore, the cost bond
20 must be \$250 at the least, \$5000 at the most. 19 U.S.C. § 1608. If the person
21 wishes to contest the forfeiture in district court but does not have the money to
22 provide the cost bond, he may submit a sworn affidavit setting forth the basis for
23 his inability to pay and request that ATF waive the cost bond and allow him to
24 proceed *in forma pauperis*. Second, within 30 days of the date of the notice of
25 forfeiture proceedings, the person may consent to the forfeiture of the property
26 through the administrative process and submit to ATF a petition for remission or

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1 mitigation of forfeiture. 19 U.S.C. § 1618. Third, the person receiving the notice
2 may take no action, and the government will proceed with summary forfeiture. 19
3 U.S.C. § 1609.

4 “The overwhelming weight of authority supports the position that a federal
5 court lacks jurisdiction to review the merits of administrative forfeiture decisions
6 once the administrative process has begun.” *United States (Drug Enforcement*
7 *Agency) v. One 1987 Jeep*, 972 F.2d 472, 280 (2d Cir.1992) (cited approvingly in
8 *Geet v. I.N.S.*, 121 F.3d 1285, 1291 (9th Cir.1997)). ATF forfeitures are no
9 exception. *See Linarez v. United States Dep’t of Justice*, 2 F.3d 208, 211-12 (7th
10 Cir.1993).

11 Mr. Larish received a letter from ATF describing these three options (Ct.
12 Rec. 11-3, Ex. 1 at 8). He chose to pursue a judicial remedy in lieu of filing a
13 petition for remission or mitigation (Ct. Rec. 11-4, Ex. 2 at 10). However, Mr.
14 Larish did not sign and date his claim of ownership or submit a cost bond along
15 with the claim as required by 19 U.S.C. § 1608. ATF sent a letter to Mr. Larish
16 notifying him of the problems with his first claim and giving him approximately
17 two additional weeks to file a proper claim of ownership with cost bond (Ct. Rec.
18 11, Ex. 2 at 10). Mr. Larish sent a letter in response explaining why he would not
19 be submitting a \$250 cost bond. Defendant’s Exhibit 4. ATF alleges it received
20 the letter four days after the deadline (Ct. Rec. 11, Ex. 2 at 10). Therefore, Mr.
21 Larish’s claim was flawed in two ways: (1) Mr. Larish did not certify the claim
22 with the required cost bond but also did not request to proceed *in forma pauperis*,
23 as someone who claims and demonstrates an inability to pay the costs of litigation;
24 and (2) Mr. Larish did not file the claim by the deadline. (Ct. Rec. 11, Ex. 2 at
25 10); Defendants’s Exhibit 4; *see* 19 U.S.C. § 1608.

26 ATF then notified Mr. Larish on August 5, 2009, that in light of Mr.

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1 Larish's failure to trigger the judicial remedy, the agency would proceed with the
2 administrative forfeiture action (Ct. Rec. 11, Ex. 2 at 10). On August 17, 2009,
3 the agency sent Mr. Larish a Declaration of Administrative Forfeiture completing
4 the forfeiture of the silencer to the United States Government (Ct. Rec. 11, Ex. 3 at
5 12).

6 When Mr. Larish did not take the opportunity to post a claim and bond to
7 obtain judicial forfeiture, as permitted by 19 U.S.C. § 1608, he waived his
8 opportunity for a hearing and deprived this Court of jurisdiction to decide whether
9 he is entitled to return of the silencer or other relief such as remission or
10 mitigation. *See, e.g., Gete*, 121 F.3d at 1291.

11 *B. Mr. Larish's Claim that Gun Control Laws are Unconstitutional*

12 Mr. Larish alleges in his complaint that the National Firearms Act, the Gun
13 Control Act, and all other gun control measures, "whether state, city, or federal"
14 are unconstitutional (Ct. Rec. 1 at 2). The United States moves for dismissal on
15 the ground of Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief
16 can be granted.

17 The National Firearms Act ("NFA"), 26 U.S.C. §§ 5801-et seq., imposes
18 registration requirements on any device defined as a "firearm." Machine guns,
19 sawed-off shotguns and rifles, silencers, and other dangerous weapons fall within
20 the term "firearms." The NFA has repeatedly survived challenges to its
21 constitutionality. *See Sonzinsky v. United States*, 300 U.S. 507 (1937)
22 (The National Firearms Act of 1934 is a constitutionally permissible exercise of
23 Congress' authority to tax.); *United States v. Miller*, 307 U.S. 174 (1939) (The
24 National Firearms Act of 1934 does not violate Second Amendment to the
25 United States Constitution or impinge on the reserved powers of the
26 States); *Haynes v. United States*, 390 U.S. 85 (1968) (Congress, subject to

1 constitutional limits, may regulate the manufacture, transfer, and
2 possessions of firearms and may tax unlawful activities) (rev'd on Fifth
3 Amendment grounds); *United States v. Freed*, 401 U.S. 601 (1971) (revisions to
4 the National Firearms Act of 1934 are also constitutional). Mr. Larish's
5 arguments are unpersuasive that the NFA is unconstitutional in light of the
6 extensive prior case law holding that it is constitutional.

7 Nor does Mr. Larish's challenge cast doubt on the constitutionality of the
8 Gun Control Act of 1968, 18 U.S.C. §§ 921 et seq., which requires anyone
9 importing, manufacturing, or dealing in firearms or ammunition to have a license
10 and makes certain acts relating to firearms unlawful. *See, e.g., U.S. v. Gonzalez*,
11 121 F.3d 928 (5th Cir. 1997), reh'g denied, (Oct. 1, 1997) and cert. denied, 118
12 S.Ct. 726 (U.S. 1998) and cert. denied, 118 S. Ct. 1084 (U.S. 1998) (constitutional
13 to prohibit possession of an unlawful machine gun); *Hamblen v. U.S.*, 591 F.3d
14 471 (6th Cir.2009) (Second Amendment right to bear arms does not provide for
15 unlicensed possession of unregistered firearms for personal use).

16 Mr. Larish's request that the Court find any and all gun control measures
17 unconstitutional is not a claim for which relief can be granted and, given the lack
18 of material factual dispute on the matter, the United States is entitled to judgment
19 in its favor as a matter of law on this issue. Fed. R. Civ. P. 12(b)(6); Fed. R. Civ.
20 P. 56.

21 *C. Mr. Larish's Claim that the Agency Acted Unconstitutionally in Retaining*
22 *the Silencer*

23 Even where the court lacks jurisdiction to consider whether a person
24 claiming property is entitled to discretionary relief from the effects of a forfeiture,
25 the court still may have jurisdiction to determine whether the forfeiture was
26 unlawful and violated due process. *See Simons v. U.S.*, 497 F.2d 1046 (1974);

1 *Gete*, 121 F.3d at 1292.

2 However, Mr. Larish does not show that the silencer was wrongfully seized
3 or that he did not receive proper notice of the administrative forfeiture process or
4 an opportunity to be heard prior to the forfeiture. Rather, as analyzed above, the
5 ATF followed the forfeiture process set out by federal statutes, starting in May
6 2009 and ending in August 2009. There is no factual dispute between the parties
7 on this matter. Although Mr. Larish may be understandably frustrated that the
8 ATF did not initiate forfeiture proceedings until one year after retaining the
9 silencer and several months after Mr. Larish filed his suit with this Court, that
10 delay does not support a finding that the forfeiture was unconstitutional. There is
11 no basis to find that the forfeiture was unlawful or in violation of due process.
12 Accordingly, the Court finds that the United States is entitled to judgment as a
13 matter of law under Fed. R. Civ. P. 56.

14 15 **V. Conclusion**


16 Summary judgment in favor of the United States is appropriate on all of the
17 claims in this suit. On its face, Mr. Larish's loss of his antique silencer in the
18 process of trying to pay any taxes owed and properly register the device does not
19 appear just. However, the Constitution gives Congress the power to make laws.
20 U.S. Const., Art. I, § 8. The Court is bound to apply the laws that Congress has
21 passed. ATF, as part of the executive branch of government, has the duty and
22 power to enforce those laws. Therefore,

23 **IT IS HEREBY ORDERED:**

24 1. The United States's Motion to Dismiss and Motion for Summary
25 Judgment (**Ct. Rec. 9**) is **GRANTED**.

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IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order, furnish copies to Mr. Larish and the United States, and close the file.


s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Court Judge